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### **B. State-Religion**

This is the second most dominant dimension in Israeli politics (Sened: 1996, Schofield, Sened and Nixon: 1998) and a common subject to come before the HCJ. In cases raising the issue of the state's legitimacy as a Jewish state and in cases involving the dominance of the orthodox-religious institutions, the Court was careful not to intervene and was not inclined to be too critical. The same strategy was adopted regarding cases about the definition of 'who is a Jew.' The Court eased the procedures enforced on people who converted abroad. Yet, it emphasized the portray of Israel as a Jewish and democratic state, legitimized its national Jewish character and ruled that Jewishness is the most fundamental constitutional facet of Israel.<sup>ix</sup>

A change in the religious status quo established since 1937 would raise a political opposition to the Court. A majority of the Jews in Israel support the Jewish character of the state, despite severe rift over its religiosity. *Environment 3 and Game 3 are relevant*, predicting an equilibrium result of abdication-compliance. The HCJ legalized and legitimized the Jewish character of the state, and the Executive conceived it as a proper judicial role, which does not contradict the Executive's interests for using religion as political power.

Yet, in several areas, the HCJ intervened and ruled in contradiction to the aspirations of the religious establishment. One issue in point is gender equality. In two rulings toward the end of the 80s' the Court decided that female can serve on religious municipal councils. The Court used the value of equality as the reason to establish its

ruling, asserting that in this issue the Rabbinical religious law should be subordinated to the Israeli secular law.<sup>x</sup>

At the time of the rulings (1986-7) a National Unity Government was in power. It included the two major parties, Labor and Likud, which reduced the bargaining power of the religious parties. By consequence, the likelihood of formation of an anti-judiciary coalition declined. The atmosphere of liberalism among important strata of Israeli society was prominent and the public support for appeals on gender equality was high.

***Environment 1 emerged. Game 1 is relevant***, and the Subgame Perfect Nash Equilibrium of Game 1 is upholding-evasion.

The HCJ conceived gender equality as a means to become more influential, relying on the liberal aspirations of the main reference groups of the Court. The lack of an effective religious political opposition to the Court, in times of 'national unity government', made it more convenient for the Court to rule in this way.

Were the Court to abdicate or adjudicate it would have hampered a prospect to become a stronger political player in that context. The Executive could not comply with an upholding because it would de-legitimize the orthodox establishment. Counter-judicial measures, as another option, would have precipitated a constitutional crisis where the Court is majoritarian, and the Executive is perceived as disrespectful of gender equality. This is the logic behind the equilibrium result of upholding-evasion in game 1. The Executive has not attacked the Court for its rulings, but the religious establishment continued to prevent women from being elected to municipal religious councils, totally ignoring the Court's rulings.

In 1995 the Labor Party and Shas drafted a coalition agreement according to which

if the Court rules in contradiction to the ‘secular-religious status-quo’, Labor is committed to alter the results of such a ruling in special legislation. An appeal against this agreement was submitted.<sup>xi</sup> Thus, a clear anti-judiciary coalition was formed against any intervention of the Court in the religious status quo. Yet, a majority of the public supported the appeal, aimed not only to invalidate this coalition agreement and to ensure the Court’s authority, but also to constrain the ultra-orthodox parties. ***Environment 4 and game 4 are relevant.*** The Court faced a real intimidation to its status. An abdication would have sent a sign of institutional weakness. An upholding, on the other hand, would have created a frontal collision with the Executive and anti-judiciary coalition that supported it in parliament. Such a collision could easily result in anti-judiciary measures.

A split ruling resulted. Three justices out of five supported the dismissal of the appeal using the rhetoric that upholding could jeopardize the Court authority and create an unprecedented institutional crisis. The minority opinion aspired to gain visibility to further improve the Court’s status as hegemonic institution. The HCJ chose adjudication. All five justices warned of the immorality of such a coalition agreement, and recognized the HCJ’s authority to declare its illegality. Nonetheless, the majority opinion dismissed the appeal.

Game4 is helpful in clarifying the incentives behind this . If the Courwere to uphold the appeal, the price could have been a confrontation with the Executive, and primarily the religious parties. An abdication would have resulted in a negative image of the Court, as shying away from any say about crucial public affairs. Adjudication made the Court stronger while reducing to minimum the risk of a

constitutional crisis. The Executive chose evasion because compliance would have meant a loss in political status. An attack on the Court could have caused public outrage among the liberal groups.

The equilibrium result of game 4 is adjudication-evasion. The Court becomes stronger due to its willingness to send signals of warning. The Executive evaded it without paying a heavy constitutional and political price.

## VI. Conclusions

Our research question of how Courts improve their political status vis-a-vis other institutional players and, alternatively, may see this political status eroded, has not been sufficiently researched, as of yet. We have chosen to struggle with this crucial problem in the framework of institutional games, which are rarely used in comparative studies of courts and politics. Hence, we contribute a model, which suggests an analytical approach to the study of courts and politics in institutional comparative context of democracies. Yet, this game is sensitive to various environments. To do this we proceeded as follows:

1. We developed a comparative analytical framework, defining four environments relevant for the Executive-Court game. We use the nature of elite coalitions and the extent of public support for the appeal to define these environments.
2. We constructed a game to model the interaction between the Court and the Executive in order to explore the strategic maneuvering over relative status among them.
3. We deduced four different payoff matrices from three status variables for the four environments. In each environment we obtain a different equilibrium outcome to the Executive-Court game. This enabled us to formulate hypotheses about conditions under which supreme courts may gain, maintain or lose political status.

Our analysis shows that two conditions are sufficient for a Court to improve, via strategic response to appeals, its political status as an institution (**Environment 1**):

1. Absence of anti-judiciary coalition opposing its expected rulings,
2. Majoritarian support for the appeal.

What happens if one or both of these conditions does not hold? We find that it depends on which condition is missing. The outcome of the Executive-Court game is contingent on the environment in which it is played. In Game 2 we analyze the case in which no anti-judiciary coalition exists, but the Court does not enjoy majoritarian public support for upholding the appeal. The equilibrium result, adjudication-evasion, is not Pareto-optimum (the Pareto optimum is upholding-evasion). The Court is not intervening, and its ability to impose norms is restricted. This suggests that if courts do not enjoy majoritarian support for upholding an appeal, their ability to be welfare improving agents is restricted. It also means that Courts are to a large extent captives of majoritarian trends.

In game 3 we explore how courts deal strategically with a countermajoritarian appeal, under the constraints of an anti-judiciary coalition. The Pareto optimal unique subgame perfect equilibrium is abdication-compliance. The Court prefers to avoid confrontation with the Executive and preserves its power for future appeals. Any other strategy by the Court would lead to counter-judiciary measures by the Executive. Paradoxically, abdication makes the Court gain some status due to its sensitivity to the public mood and to the anti-judiciary coalition, despite the non-intervention policy it takes.

Environment 4 completes the picture. The equilibrium in game 4 is adjudication-evasion. A comparison of games 2 and 4 reveals that majoritarian support is more important to the Court's power than the existence or non-existence of an anti-judiciary coalition. Supreme courts gain more from adjudicating a majoritarian appeal, when anti-judiciary coalition exists, and they gain little from adjudicating a countermajoritarian

appeal even when no anti-judiciary coalition exists.

The institutional game we suggest and analyze illuminates why Courts may gain or lose status as political actors. The game only covers one dyad (Executive-Court) and explains only one part of the picture. But we demonstrated the theoretical and empirical gains in conceptualizing supreme courts as constrained actors using the logic of strategic games. Paradoxically, in using this approach we recognize the importance of cultural settings as a significant part of the environmental configurations that are essential for the study of courts as political actors.

As a final point we wish to emphasize an important difference between the approach adopted here and the approach that is prevalent in the literature cited above. The majority of the studies that look into the strategic nature of the behavior of justices and courts model the Court's strategic decision in terms of an attempt to form or implement some policy position in some dominant policy space. The trend in this literature is to demonstrate that the median justice has clear policy preferences. Then, the literature emphasizes how the Court's decision is influenced by its desire to bring about the formation or implementation of the policy position which is the closest possible, sometimes given the actions of other institutional players, such as the President and Congress, to the most preferred policy position of the median justice.

This dominant trend in the literature is not surprising, given the well-established and independent status of the U.S. judicial system, which is the subject of most of these studies. However, in most democratic political systems the status of the Supreme Court cannot be taken for granted. Therefore, as we move from the study of American politics to a more comparative approach, we must make one step backwards and model the way in

which the Court establishes, maintains, improves or loses its status. This is the main focus of this article.

Put in other words, especially the literature about courts and justices in American politics inclines to model the strategic interaction between the Court and other institutional actors as concerning the struggle over the implementation of one or another policy position, taking the status of the Court, implicitly, as given. We model the struggle of the Court to establish, maintain, and improve its political status vis-a-vis other institutional actors and leave implicit (though present) the differences in preferences between the Court, the public, and institutional actors in the Court's immediate environment.

### **End Notes**

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- <sup>i</sup> Game theorists often mention that the payoff distributions of games are determined by the environment in which, the game is played. Our model demonstrates how this basic notion can be very useful for comparative studies of institutions.
- <sup>ii</sup> HCJ 320/80 Kauseme V. Minister of Defense [1980] P.D. 35 (3) 113.
- <sup>iii</sup> HCJ 5973/92 The Association for Civil Rights V. The Minister of Defense [1992] P.D. 47 (1) 267.
- <sup>iv</sup> HCJ 64/51 Daud V. Minister of Defense [1951] P.D. 5, 1117; HCJ 239/51 Daud V. Committee of Appeals [1951] P.D. 6, 229; HCJ 141/81 The Committee for the Ikrit Refugees [1981] P.D. 36 (1) 129.
- <sup>v</sup> HCJ 428/86 Barzilai V. The Israeli Government [1986] P.D. 40 (3) 505.
- <sup>vi</sup> HCJ 734/83 Shain V. The defense Minister [1983] P.D. 38 (3) 393.
- <sup>vii</sup> HCJ 910/86 Ressler V. The Minister of Defense [1986] P.D. 42 (2) 441.
- <sup>viii</sup> HCJ 680/88 Schnizer V. The Chief Military Censor [1988] P.D. 42 (4) 617.
- <sup>ix</sup> See for example: HCJ 58/68 Shalit V. Minister of Interior [1968] P.D. 23 (2) 477.
- <sup>x</sup> HCJ 153/87 Shakdiel V. The Minister of Religion [1987] P.D. 42 (2) 221; HCJ 953/87 Poraz V. The mayor of Tel Aviv [1987] P.D. 42 (2) 309.
- <sup>xi</sup> HCJ 5364/94 Velner V. Rabin, Labor and Shas [1994] P.D. 49 (1) 758.